REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 13/2016

In the matter between

THE STATE

And

CHIKA MUSHWENA LIEMISA

HIGH COURT MD REVIEW CASE NO 358/2016

Neutral citation: State v Liemisa (CR 13/2016) [2016] NAHCMD 54 (03 March 2016)

CORAM: **LIEBENBERG J *et* SHIVUTE J**

DELIVERED: 03 March 2016

Flynote: Criminal procedure – Plea – Guilty – Questioning in terms of s 112 (1)*(b)* – Court must examine whether explanation substantiates plea – Court not to draw inferences from accused's answers.

Criminal law – Housebreaking *per se* no crime – Must be accompanied by intention to commit another crime.

ORDER

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1. The conviction and sentence are set aside.
2. The matter is remitted to the same court in terms of s 312 (1) of Act 51 of 1977 with the direction to further question the accused in terms of s 112 (1)*(b)* of the Act.
3. In the event of a conviction, the court, in sentencing, must have regard to the sentence already served by the accused.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty to a charge of Housebreaking with intent to steal and theft, and sentenced to 12 months' imprisonment.

[2] On review a query was directed to the presiding magistrate, enquiring whether the conviction was proper in view of the court during its questioning of the accused in terms of s 112 (1)*(b)* of the Criminal Procedure Act, 51 of 1977 (CPA), having omitted to determine what the accused's intentions were at the time of the breaking and entering of the complainant's premises.

[3] In the magistrate's reply it was submitted that the accused had made use of pliers; that he entered the complainant's house without permission; and *his intention was to steal and to sell the property and raise money*. For the afore-going reasons, the magistrate reasoned, it was 'common cause' that the accused upon entering had the intention to steal.

[4] There is *per se* no crime such as 'housebreaking', unless accompanied by the intention to commit some other crime (*S v Maseko and Another*[1]; *State v Gideon Shuuveni*[2]). What this means is, that at the time of the breaking and entering, the accused must already have formed the intention to commit some other crime once inside for example, to steal, rape or murder. The fact that the accused, in the present instance, committed theft thereafter, does not mean – as the magistrate reasoned – that the accused therefore must have had the intention to steal, for he could have formed that intention only *after* he had entered the premises. It is settled law that the court is not entitled to draw inferences from the answers given by the accused during the court's questioning in terms of the said section of the CPA (*S v Nashapi*[3]; *S v Kaevarua*[4]).

[5] The accused in the present matter was not questioned as to what his intentions were during the breaking and entering of the premises, and the conclusion reached by the magistrate, that the accused at the relevant time had the required intent, is not

[1]2004 (1) SACR 22 (TPD) at 22h-i
[2](CR 10/2014) [2014] NAHCNLD 21 (20 March 2014)
[3]2009 (2) NR 793 (HC)
[4]2004 NR 144 (HC)

supported by the answers given by the accused during the court's questioning. The conclusion reached by the court is based on inferential reasoning, which the court was not entitled to do in the circumstances, as it was not required to interpret or evaluate the truth, or otherwise, of the accused's answers. To this end the court misdirected itself and the conviction falls to be set aside.

[6] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is remitted to the same court in terms of s 312 (1) of Act 51 of 1977 with the direction to further question the accused in terms of s 112 (1)*(b)* of the Act.
3. In the event of a conviction, the court, in sentencing, must have regard to the sentence already served by the accused.

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J C LIEBENBERG

JUDGE

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N N SHIVUTE

JUDGE